

(916) 324-6594

December 6, 1985

Reassessment of Real Property
After Granting of Easement

Dear Mr. _____

In your letter to _____ of October 28, you request our opinion of whether a change in ownership would occur as a result of granting an easement under the following facts described in your letter:

"Parcel 1 fronts on a public road. Parcel 2 is landlocked. The owner of Parcel 1 grants to the owner of Parcel 2 a non-exclusive, twenty foot right of way for ingress and egress onto Parcel 2."

Neither the Revenue and Taxation Code nor the Property Tax rules promulgated by the Board deal specifically with the question of whether a grant of an easement is a change in ownership for property tax purposes.

Revenue and Taxation Code* Section 60 does, however, define change in ownership to mean "a transfer of a present interest in real property, including the beneficial use thereof, the value of which is substantially equal to the value of the fee interest."

Although an easement is not an estate in real property because it is nonpossessory, it is an interest in real property. (Darr v. Lone Star Industries, Inc. 419791 94 Cal.App.3d 895.) Under the facts described above, it also appears to be a present interest. Further, it is clear that the owner of the easement will have the beneficial use of the described real property for right-of-way purposes.

* Statutory references are to the Revenue and Taxation Code unless otherwise indicated.

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Assuming the easement to be granted in this case is perpetual, the only question here is whether the value of the easement is substantially equal to the value of the fee interest (in the identically described land) considering the fact that the easement here is nonexclusive. When an easement is nonexclusive, the servient owner may use the easement as long as his use does not interfere with or impede the right of use of the easement owner. (Atchison, Topeka & Santa Fe Railroad Company v. Abar (1969) 275 Cal.App.2d 456.) Since the servient owner's use can't interfere with the easement owner's use as a right-of-way, the easement owner's use of the easement for right-of-way purposes is substantially equivalent to the use he could make of the twenty foot strip if he owned an exclusive easement or if he owned the twenty foot strip in fee simple. It could, therefore, be argued that the value of the nonexclusive easement in this case is substantially equal to the value of the fee interest. We have taken the opposite position, however, with respect to nonexclusive easements for ingress and egress as indicated by the enclosed copy of a memo of ¹¹⁻¹¹ formerly of our legal staff, dated November 24, 1981.

Accordingly, it is our opinion that the grant of the nonexclusive easement described above would not constitute a change in ownership as defined by Section 60.

The views expressed in this letter are, of course, only advisory in nature. They are not binding upon the assessor of any county. You may wish to consult the appropriate assessor(s) in order to confirm that the described property will be assessed in a manner consistent with the conclusions stated above.

Very truly yours,

Eric F. Eisenlauer
Tax Counsel

EFE:fr

Enclosure

220.0163 **Easement.** The granting of a conservation easement to a nonprofit entity which easement restricts the use by the owner of the property to the existing and historical ranching and farming activity compatible with the preservation and protection of the natural, open space and scenic qualities of the property does not result in a change in ownership regardless of the length of the period for which the easement is to exist. C /16/84.

(916) 323-7715

February 16, 1984

Dear Mr. .

This is in response to your February 3, 1984, letter wherein you enclosed copies of a December 7, 1983, letter from to County Counsel , state and federal income tax exemption letters issued to M Trust, the Deed of Conservation Easement utilized by the Trust, and the Trust's Articles of Incorporation and By-Laws, and you asked that we review the documents and advise as to whether we agree with Mr. , conclusion that conservation easement(s) obtained by the Trust pursuant to such Deeds to it are not changes in ownership as defined by Revenue and Taxation Code Section 60.

Such Deeds of Conservation Easement follow from Civil Code Section 815 et seq. which provide for the conveyance of conservation easements to certain nonprofit organizations. Summarizing the Whereas Clauses of the Trust's Deed, because of a property's agricultural attributes and aesthetic values and the desire of the owner of the property and the Trust to retain such attributes and values, the owner/grantor is willing to donate a conservation easement over the property, thereby restricting and limiting the uses of the property in certain respects, and the grantee Trust agrees to preserve and protect in perpetuity such attributes and values. Specific rights conveyed by the Paragraph 2 of the Deed to the Trust are the following:

"(a) To identify, to preserve and to protect in perpetuity the natural, open space, scenic, agricultural and aesthetic attributes and the soil and water quality of the Property.

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"(b) To enter upon the Property and to inspect, observe, study and make scientific observations of and upon the Property, for the sole purpose of determining that Grantors' uses of the Property are consistent with the terms and conditions of this Conservation Easement. Such inspections shall be permitted and made at least once a year, upon prior notice to Grantors, and shall be made in a manner that will not unreasonably interfere with the proper uses of the Property.

"(c) To enforce the rights herein granted."

Specific uses and practices upon the property prohibited by Paragraph 4 of the Deed are:

"(a) The change, disturbance, alteration, or impairment of the natural, scenic, open space, agricultural and aesthetic features of the Property, except as otherwise provided herein.

"(b) The establishment of any commercial or industrial uses or the construction, placing, or erection of any signs or billboards;....

"(c) The construction, reconstruction, or replacement of any structure except....

"(d) The division, subdivision, or de facto subdivision of the Property; provided,....

"(e) The use of motorized vehicles, except for ranch management purposes, off existing roadways or roadways the construction of which is authorized herein, which would in any way result in the degradation of the natural, scenic, open space, agricultural and aesthetic qualify of the Property.

"(f) The establishment or maintenance of any commercial feedlot.

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"(g) The commercial harvesting of timber, provided, however, that Grantors shall have the right to collect firewood for the heating of ranch and residential facilities, and to cut trees as necessary or desirable for agricultural purposes, for the construction of fences, and for the repair and construction of such buildings or other improvements on the Property as are allowed hereunder.

"(h) The construction of any new roadway; provided,....

"(i) The dumping or other disposal of noncompostible refuse on the Property, except....

"(j) Ranching, agricultural or other uses, otherwise permitted under this Easement, which result in degradation of topsoil quality,...."

The owner/grantor, however, retains exclusive access to and use of the property, except as expressly provided in the Deed. (Paragraph 2), the right to deny access to the public (Paragraph 9), and the right to pursue the following uses and practices upon the property (Paragraph 3):

"(a) To continue historical ranching and farming activity compatible with the purposes of this Easement, including the purchase, pasturing, grazing, feeding, care and sale of livestock and the planting, raising, harvesting, and sale of agricultural crops of every nature and description; provided, however, that (i) such ranching or agricultural activities shall not result in overgrazing, soil degradation, or the pollution or degradation of any surface or subsurface waters (as shall be determined by a person or persons qualified by education and training to determine proper grazing practices, soil quality, or water quality, as the case may be), and that (ii) the pastoral, scenic and open space quality of the Property shall be maintained in a condition at least as favorable as that existing as of the date of the grant of this Easement, as established by the baseline study provided for in paragraph 5 hereof.

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"(b) To maintain and repair existing structures, fences, corrals, ditches, and other improvements on the Property. Additional nonresidential structures, facilities and fencing reasonably necessary to the ranching and agricultural activities contemplated by this Easement (including solar energy, biogas, or other energy-efficient facilities) shall be permitted, provided....

"(c) To build, maintain, and repair once built, no more than [] residences on the Property, located as provided in Exhibit B attached hereto and made a part hereof by reference; to provide access and utilities to said residences in a manner consistent with the purposes of this Easement; to use such natural materials found on the Property in the construction of such residences as Grantors shall deem necessary or convenient; provided,....

"(d) To develop and maintain such water resources on the Property as are necessary or convenient for ranching, agricultural, irrigation, and residential uses; provided,....

"(e) To use agrichemicals, including, but not limited to, fertilizers and biocides, but only in those amounts and with that frequency of application necessary to accomplish reasonable grazing and agricultural purposes....

"(f) To control predatory and problem animals by the use of selected control techniques....

"(g) To utilize the Property for hunting by Grantors, their heirs, licensees, and assigns, to the extent that harvesting of game from the Property is not detrimental to wildlife balance.

"(h) To utilize the Property for recreational or educational purposes, including, but not limited to, hiking, horseback riding, fishing, and nature studies.

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"(i) To engage in the production of food and fiber products and by-products derivative from the ranching and agricultural activities conducted on the property; provided,....

"(j) Grantors specifically retain (i) all right, title, and interest in and to all tributary and non-tributary water, water rights, and related interests in, on, under, or appurtenant to the land; and (ii) all right, title, and interest to subsurface oil, gas, and other minerals; provided, however, that exploration for, and extraction of any minerals shall be undertaken only with the prior approval of Grantee and any exploration and/or extraction shall be undertaken in a manner designed to insure the protection of the natural, scenic, open space, agricultural and aesthetic attributes of the Property, and only by a subsurface method consistent with the provisions of Section 170(h) of the Internal Revenue Code....

"(k) To maintain a cemetery plot on the Property for the interment of Grantors, their lineal descendants, and spouses of their lineal descendants, at a location to be agreed upon between Grantors and Grantee.

"(l) If desired by Grantors, to bury or otherwise camouflage all utility systems or extensions of existing utility systems constructed in the future."

As pointed out by Mr. Revenue and Taxation Code Section 60 provides that "change in ownership" means a transfer of a present interest in real property, including the beneficial use thereof, the value of which is substantially equal to the value of the fee interest. Since easements conveyed to the Trust pursuant to its Deed of Conservation Easement are negative easements, easements which prevent the owners/grantors from making and engaging in the above-mentioned uses and practices, since the owners/grantors retain exclusive access to and use of their properties, and since every incident of ownership not inconsistent with an easement is reserved to the owners/grantors, (Dolske v. Gormley, 58 Cal. 2d 513, and Dierssen v. McCormack, 28 Cal. App. 2d 164), we

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agree with Mr. conclusion that the creation of such an easement does not constitute a transfer of the beneficial use of a present interest in real property for purposes of Section 60. Since the value of the interest transferred is not substantially equal to the value of the property, we also agree with Mr. conclusion that the "substantially equal" requirement of Section 60 is not met. We do, however, believe that the creation of such an easement results in a transfer of a present interest in real property since easements, however they may be classified, have been defined as interests in land. See Eastman v. Piper, 68 Cal. App. 554, and City of Hayward v. Mohr, 160 Cal. App. 2d 427.

In sum, since not all the requirements of Section 60 are met, we agree that no change in ownership occurs upon the execution of the Deed of Conservation Easement utilized by the Trust. It follows that no separately assessable real property interest would result upon the execution of such Deed.

Very truly yours,

James K. McManigal, Jr.
Tax Counsel

JKM:fr